

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

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MATTHEW TIMOTHY MESLOH,

Plaintiff,

WALMART

Defendant

Case No. 3:24-CV-00494-ART-CLB

**ORDER GRANTING MOTION TO AMEND
AND DISMISSING AMENDED
COMPLAINT WITH LEAVE TO AMEND**

[ECF No. 13]

10 Before the Court is Plaintiff Matthew Timothy Mesloh's ("Mesloh") motion to amend
11 complaint, (ECF No. 13), and proposed amended complaint, (ECF No. 13-1). For the
12 reasons stated below, Mesloh's motion to amend complaint, (ECF No. 13), is granted,
13 and his amended complaint (ECF No. 13-1), is dismissed, with leave to amend.

14 I. SCREENING STANDARD

15 Prior to ordering service on any Defendant, the Court is required to screen an *in*
16 *forma pauperis* complaint to determine whether dismissal is appropriate under certain
17 circumstances. See *Lopez*, 203 F.3d at 1126 (noting the *in forma pauperis* statute at 28
18 U.S.C. § 1915(e)(2) requires a district court to dismiss an *in forma pauperis* complaint
19 for the enumerated reasons). Such screening is required before a litigation proceeding
20 *in forma pauperis* may proceed to serve a pleading. *Glick v. Edwards*, 803 F.3d 505, 507
21 (9th Cir. 2015).

22 "[T]he court shall dismiss the case at any time if the court determines that – (A)
23 the allegations of poverty is untrue; or (B) the action or appeal – (i) is frivolous or
24 malicious; (ii) fails to state a claim upon which relief may be granted; or (iii) seeks
25 monetary relief against a defendant who is immune from such relief." 28 U.S.C. §
26 1915(e)(2)(A), (B)(i)-(iii).

27 Dismissal of a complaint for failure to state a claim upon which relief may be
28 granted is provided for in Federal Rule of Civil Procedure 12(b)(6), and 28 U.S.C. §

1 1915(e)(2)(B)(ii) tracks that language. When reviewing the adequacy of a complaint
 2 under this statute, the court applies the same standard as is applied under Rule 12(b)(6).
 3 *See, e.g., Watison v. Carter*, 668 F.3d 1108, 1112 (9th Cir. 2012) (“The standard for
 4 determining whether a plaintiff has failed to state a claim upon which relief can be granted
 5 under § 1915(e)(2)(B)(ii) is the same as the Federal Rule of Civil Procedure 12(b)(6)
 6 standard for failure to state a claim.”). Review under Rule 12(b)(6) is essentially a ruling
 7 on a question of law. *See Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir.
 8 2000) (citation omitted).

9 The Court must accept as true the allegations, construe the pleadings in the light
 10 most favorable to the plaintiff, and resolve all doubts in the plaintiff’s favor. *Jenkins v.*
 11 *McKeithen*, 395 U.S. 411, 421 (1969) (citations omitted). Allegations in *pro se* complaints
 12 are “held to less stringent standards than formal pleadings drafted by lawyers[.]” *Hughes*
 13 *v. Rowe*, 449 U.S. 5, 9 (1980) (internal quotations marks and citation omitted).

14 A complaint must contain more than a “formulaic recitation of the elements of a
 15 cause of actions,” it must contain factual allegations sufficient to “raise a right to relief
 16 above the speculative level.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 17 “The pleading must contain something more. . . than. . . a statement of facts that merely
 18 creates a suspicion [of] a legally cognizable right of action.” *Id.* (citation and quotation
 19 marks omitted). At a minimum, a plaintiff should include “enough facts to state a claim to
 20 relief that is plausible on its face.” *Id.* at 570; *see also Ashcroft v. Iqbal*, 556 U.S. 662,
 21 678 (2009).

22 A dismissal should not be without leave to amend unless it is clear from the face
 23 of the complaint the action is frivolous and could not be amended to state a federal claim,
 24 or the district court lacks subject matter jurisdiction over the action. *See Cato v. United*
 25 *States*, 70 F.3d 1103, 1106 (9th Cir. 1995); *O’Loughlin v. Doe*, 920 F.2d 614, 616 (9th
 26 Cir. 1990).

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1 **II. SCREENING OF AMENDED COMPLAINT**

2 In his amended complaint, Mesloh sues his former employer, Walmart. (ECF No. 3 13-1.) In reviewing his amended complaint, Mesloh's action appears to be time-barred.

4 Pursuant to 42 U.S.C. § 2000e-5(f)(1), a plaintiff must file his civil suit within 90 5 days of receiving his Notice of Right to Sue. Mesloh has failed to do so. Mesloh has 6 indicated that he received his Notice of Right to Sue letter on March 19, 2024. (ECF No. 7 13-1 at 14.) Mesloh signed and filed his original complaint on November 1, 2024. (ECF 8 No. 1-1 at 5.) Thus, Mesloh's complaint is time-barred because it was filed more than 90 9 days after the Notice of Right to Sue.

10 “The purpose of a statute of limitations ‘is to require diligent prosecution of known 11 claims, thereby providing finality and predictability in legal affairs and ensuring that claims 12 will be resolved while evidence is reasonably available and fresh.’” *Marczuk v. Las Vegas 13 Metro. Police Dep’t*, 2019 WL 2112984 (D. Nev. Feb. 13, 2019) (citing *Scott v. Gino 14 Morena Enters., LLC*, 888 F.3d 1101, 1110 (9th Cir. 2018) (quoting Statute of Limitations, 15 Black’s Law Dictionary (10th ed. 2014))); *see Dawson v. Valdez*, 797 Fed. Appx. 321, 321 16 (9th Cir. 2020) (The district court properly dismissed [plaintiff’s] disability discrimination 17 claim because [plaintiff] failed to file [his] claim within the applicable limitations period, 18 and failed to allege facts sufficient to establish that the EEOC rescinded the notice of right 19 to sue on [his] disability discrimination claim); *see also* 42 U.S.C. § 2000e-5(f)(1) (setting 20 forth 90-day period in which Title VII complainant may bring a civil action); *Payan v. 21 Aramark Mgmt. Servs. Ltd. P’ship*, 495 F.3d 1119, 1121-22 (9th Cir. 2007) (90-day period 22 operates as a limitations period; if a litigant does not file suit within 90 days of receipt of 23 the notice of the right to sue, the action is time-barred); *Reed v. Cognizant Tech. Sols.*, 24 849 Fed. Appx. 207, 208 (9th Cir. 2021) (holding that the district court properly dismissed 25 plaintiff’s action as time-barred because she filed the action after the applicable statute of 26 limitations had run and she failed to show extraordinary circumstances beyond her control 27 that justified equitable tolling) (internal citations omitted).

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1 Here, Mesloh filed his complaint after the 90-day time limit had expired. As
2 previously stated, Mesloh indicated in his complaint that he received a Notice of a Right
3 to Sue from the EEOC on March 19, 2024. Pursuant Federal Rules of Civil Procedure
4 Rule 26(a)(1), 90 days from the indicated date was June 17, 2024. The original complaint
5 (ECF No. 1-1) was filed on November 1, 2024, well after the last day for Mesloh to file
6 suit and is accordingly time-barred.

7 However, the Court will give Mesloh a chance to amend the complaint, to show if
8 there are any extraordinary circumstances that warranted an equitable tolling (pausing)
9 of the 90-day statute of limitation. See *Reed*, 849 Fed. Appx. at 208 (citing 42 U.S.C. §
10 2000e-5(f)(1)); see also *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005) (“Generally, a
11 litigant seeking equitable tolling bears the burden of establishing two elements: (1) that
12 he has been pursuing his rights diligently, and (2) that some extraordinary circumstance
13 stood in his way”) (internal citations omitted).

14 Accordingly, Mesloh is granted leave to file a second amended complaint to cure
15 the deficiencies of the amended complaint. If Mesloh chooses to file a second amended
16 complaint, he is advised that a second amended complaint supersedes (replaces) the
17 amended complaint and, thus, the second amended complaint must be complete in
18 itself. See *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1546
19 (9th Cir. 1989) (holding that “[t]he fact that a party was named in the original complaint is
20 irrelevant; an amended pleading supersedes the original”). Any allegations, parties, or
21 requests for relief from prior papers that are not carried forward will no longer be before
22 the court. Mesloh should clearly title the amended pleading as “Second Amended
23 Complaint.” For each Defendant and each claim, he must allege true facts sufficient to
24 show that the Defendant violated his rights. Mesloh may not amend the complaint to add
25 unrelated claims against other defendants.

26 The Court notes that, Mesloh will have until January 3, 2025, to file an amended
27 complaint addressing whether equitable tolling of the 90-day statute of limitations is
28 warranted. If Mesloh chooses not to file a second amended complaint curing the stated

1 deficiencies, the Court will recommend dismissal of this action for failure to state a claim.

2 **III. CONCLUSION**

3 For good cause appearing and for the reasons stated above, **IT IS ORDERED** that
4 Mesloh's motion to amend, (ECF No. 13), is **GRANTED**.

5 **IT IS FURTHER ORDERED** that Mesloh's amended complaint, (ECF No. 13-1), is
6 **DISMISSED, WITH LEAVE TO AMEND**.

7 **IT IS FURTHER ORDERED** that if Mesloh chooses to file a second amended
8 complaint curing the deficiencies of his complaint, as outlined in this order, Mesloh shall
9 file the second amended complaint by no later than **Friday, January 3, 2025**.

10 **IT IS FURTHER ORDERED** that if Mesloh chooses not to file a second amended
11 complaint curing the stated deficiencies of the complaint, the Court will recommend
12 dismissal of this action.

13 **DATED:** December 3, 2024

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UNITED STATES MAGISTRATE JUDGE
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